

FEDERAL CIRCUIT COURT OF AUSTRALIA

NGUYEN v MINISTER FOR IMMIGRATION & ANOR

[2016] FCCA 32

Catchwords:

MIGRATION – Partner (Temporary) (Class UK) visa/ Partner Combined (Full Fee) (UK 820/BS 801) visa – where applicant and sponsor married but never lived together – where sponsor departed Australia after marriage and was imprisoned overseas for 40 years – whether applicant and sponsor were spouses – where tribunal held they were not spouses – where tribunal’s decision not attended by jurisdictional error.

Legislation:

Migration Act 1958 (Cth), ss.5F, 5F(2)(a), (b), (c), (d)

Migration Regulations 1994, reg.1.15A

Cases cited:

Main v Main (1949) 78 CLR 636

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Obele v Minister for Immigration and Citizenship [2010] AATA 88

SZOXF v Minister for Immigration & Border Protection [2015] FCAFC 69

Applicant:

THI CAM TRANG NGUYEN

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

MIGRATION REVIEW TRIBUNAL

File Number:

BRG 549 of 2015

Judgment of:

Judge Jarrett

Hearing date:

13 October 2015

Date of Last Submission:

13 October 2015

Delivered at:

Brisbane

Delivered on:

13 January 2016

REPRESENTATION

Counsel for the Applicant: Ms Smith

Solicitors for the Applicant: Legal Guru Pty Ltd

Counsel for the First Respondent: Mr McGlade

Solicitors for the First
Respondent: Clayton Utz

The Second Respondent entered a submitting appearance.

ORDERS

- (1) The name of the Second Respondent be amended to “Administrative Appeals Tribunal”;
- (2) The application filed on 18 June, 2015 is dismissed;
- (3) The applicant pay the first respondent’s costs of and incidental to the application fixed in the sum of \$6,825.00.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 549 of 2015

THI CAM TRANG NGUYEN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. Ms Nguyen seeks judicial review of a decision of the second respondent made on 21 May, 2015 which affirmed a decision of a delegate of the first respondent not to grant her a Partner (Temporary) (Class UK) visa/ Partner Combined (Full Fee) (UK 820/BS 801) visa.
2. The first respondent opposes the application. The second respondent has entered a submitting appearance.
3. I have most helpful written submissions filed on behalf of Ms Nguyen and the first respondent to which I have paid careful attention. Both parties also made oral submissions to me at the hearing of this application.

Background

4. Ms Nguyen is a citizen of Vietnam. She first arrived in Australia on 11 June, 2008 on a student visa. On her arrival she was met at the airport by her aunt, her cousin Peter Hong Phuc Truong and Mr Truong's de facto partner, Mark Newton.
5. Mr Newton was a dual United State of America and Australian citizen who had been in a long-term relationship with Mr Truong. The couple had lived together for a lengthy period of time in Cairns. They adopted a boy in 2005. He lived with Newton and Truong in Cairns. Ms Nguyen claimed that, at the time she met them, she was unaware of the relationship between Newton and Truong.
6. Ms Nguyen and Newton stayed in contact following her arrival in Australia and, she says, a friendship developed. As Newton lived in Cairns and Ms Nguyen lived in Brisbane their communications predominantly occurred via Skype, text message or other electronic means. However, Ms Nguyen and Newton did, sporadically, meet up on several occasions for lunch when Newton came to Brisbane.
7. Ms Nguyen claimed that sometime around June, 2010 she learned of the relationship between Newton and Truong and consequently did not communicate with Newton for around three or four months. However, in October, 2010 Ms Nguyen claimed that she found out that the relationship between Newton and Truong had ceased (even though they continued to live together with their adopted child in Cairns). At that time the relationship between Ms Nguyen and Newton allegedly became "more serious". Nonetheless, because of their geographical separation, Ms Nguyen and Newton continued to communicate with one another via FaceTime.
8. In February, 2011 Newton and Ms Nguyen agreed to marry. They continued to live apart and communicate via electronic means. On 13 September, 2011 Ms Nguyen and Newton married in Brisbane.
9. On 4 October, 2011 Ms Nguyen applied for a Partner (Temporary) (Class UK) visa. Newton was named as her sponsor. On 5 October, 2011 (the day after Ms Nguyen lodged her visa application) Newton,

Truong and their adopted child departed Australia to travel in the United States of America and Europe for six weeks.

10. However, shortly after arriving in the United States of America Newton and Truong were arrested and charged with crimes relating to the sexual abuse of their adopted child and their involvement in an international child exploitation conspiracy. They were ultimately tried and convicted of those crimes. Newton was sentenced to 40 years imprisonment and Truong was sentenced to 30 years imprisonment. They both remain imprisoned in the United States of America.
11. Notwithstanding the arrest of Newton, Ms Nguyen continued with the progress of her partner visa application. She claimed that she was, and continues to be Newton's spouse.
12. On 26 July, 2013 a delegate of the first respondent refused to grant the visa to Ms Nguyen because the delegate was not satisfied that the relationship between Ms Nguyen and Newton was genuine. The delegate considered that the relationship between Ms Nguyen and Newton was contrived for the purposes of her visa application.
13. On 13 August, 2013 Ms Nguyen applied for review of the first respondent's decision by a migration review tribunal.
14. The tribunal conducted two hearings with Ms Nguyen, the first on 2 April, 2015 and the second on 11 May, 2015. She was assisted by an interpreter. She was represented by a migration agent.
15. To succeed in her application, the tribunal needed to be satisfied that, at the time of her application and at the time of the tribunal's decision, Ms Nguyen was the *spouse* or *de facto partner* of an Australian citizen, or Australian permanent resident. In this case, it needed to be satisfied that she was the spouse of Newton at the relevant times.
16. *Spouse* is defined in s.5F of the *Migration Act 1958* (Cth). The definition of that term was the same both at the time Ms Nguyen made her application and when the tribunal decided her application. Relevantly, s.5F defined spouse as follows:

5F Spouse

(1) For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a married relationship if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists.

17. The arrangements for the purpose of determining whether one or more of ss.5F(2)(a), (b), (c) and (d) of the Act exist are set out in reg.1.15A of the *Migration Regulations 1994*. That regulation was in materially the same terms when Ms Nguyen made her application for her visa and when the tribunal decided it.
18. On 21 May, 2015 the tribunal affirmed the delegate's decision not to grant Ms Nguyen the partner visa for which she had applied.
19. The tribunal's decision record reveals that it was not satisfied that Ms Nguyen was Newton's *spouse*. The tribunal's findings were summarised at paragraph 59 as follows:

59. The Tribunal notes that the parties' ability to provide further evidence regarding the factors to be considered in determining

whether or not a spousal relationship existed at the time of application is limited by the particular circumstances of this relationship, namely the sponsor's lengthy incarceration in the USA. The Tribunal accepts that, the applicant has attempted to obtain visas to the USA and the sponsor has applied for transfers to Australia and that all these avenues have been refused. The Tribunal also accepts that, subsequent to the time of application, the parties have communicated with each other by email. However, after taking this into account, and considering all the evidence before it, the Tribunal is not satisfied that all the circumstances in this case support the claim that the parties were spouses in a marriage relationship at the time of application.

20. And then again at paragraph 70:

70. After assessing all the evidence the Tribunal finds as follows. The applicant and sponsor were married on 13 September 2011. At the time of application (4 October 2011), the parties had lived together for somewhere between three days and three weeks at the sponsor's house in Cairns. They have not lived together again since that time. As set out above, very limited evidence was provided regarding the financial aspects and social aspects of their relationship. The parties had not, at time of application, and have not subsequently, established a household together. There is no evidence to indicate that, at the time of application, the applicant had any involvement in decisions regarding the sponsor's adopted son Drake and there is very limited evidence that the parties provided support to each other and had made future plans for a shared life together. The Tribunal is not satisfied that, at the time of application for the visa, the parties had a mutual commitment to a shared life together as spouses to the exclusion of all others; and that they lived together, or not separately and apart on a permanent basis.

21. In reaching its conclusion, the tribunal found that:

- a) Ms Nguyen and Newton were married on 13 September, 2011;
- b) at the time of the application she and Newton had lived together for somewhere between three days and three weeks at Newton's house in Cairns;
- c) Ms Nguyen and Newton have not lived together since that time;

- d) there was very limited evidence provided regarding the financial aspects and social aspects of Ms Nguyen's and Newton's relationship;
 - e) there was no evidence to indicate that, at the time of the application or otherwise, Ms Nguyen had any involvement in decisions regarding Newton's adopted child;
 - f) there was very limited evidence that the parties provided support to each other or had made plans for a shared life together;
 - g) Ms Nguyen and Newton had not at the time of the application and have not subsequently established a household together;
 - h) shortly after Newton departed for the United States on 5 October, 2011 Ms Nguyen did not remain in Newton's home in anticipation of his return. Instead, she returned to her home address in Brisbane and later departed for Vietnam;
 - i) there was very little evidence to show that Ms Nguyen and Newton had publicly declared their marriage to friends or the broader community. Knowledge of the parties' marriage was limited to their family members;
 - j) Ms Nguyen and Newton provided a degree of emotional support to each other, however their ability to commit to a shared life together, provide companionship and practical support to each other was significantly restricted by Newton's lengthy incarceration in the USA;
 - k) Newton's sexual relations with his adopted child, as well as other children involved in Newton's paedophile ring, raised questions about Newton's commitment to an exclusive spousal relationship with Ms Nguyen.
22. Each of the findings set out above were available to the tribunal on the evidence and information before it. Ms Nguyen did not seek to cavil with any of those findings.
23. As can be seen from the last sentence of paragraph [70] of the reasons, the tribunal was not satisfied that Ms Nguyen met two of the four

requirements of the definition of *spouse* in s.5F(2) of the Act. Specifically, the tribunal was not satisfied that s.5F(2)(b) of the Act was met because it was not satisfied that Ms Nguyen and Newton had a “mutual commitment to a shared life as spouses to the exclusion of all others”. Further, the tribunal was not satisfied that Ms Nguyen met s.5F(2)(d) because it was not satisfied that Ms Nguyen and Newton “lived together, or not separately and apart on a permanent basis”.

24. From that decision Ms Nguyen seeks judicial review. She raises three grounds of review, each of which she argues establishes jurisdictional error on the part of the tribunal. However, for the reasons that follow, I am not persuaded that the tribunal’s decision is affected by jurisdictional error.

Ground 1

25. Ground 1 of the application is in the following terms:

1. The Applicant asserts that the Second Respondent has made a jurisdictional error in incorrectly interpreting and applying the meanings of ‘separately’ and ‘apart’ in s5F(2)(d)(ii) of the Migration Act 1958 to The Applicant’s circumstances.

26. Ms Nguyen argues that the tribunal concluded that she did not meet the definition of spouse because, at the time of the application and since the lodgement of her application, the parties have not resided together, and live separately and apart on a permanent basis. She argues that in reaching that conclusion, the tribunal gave too much weight to certain parts of the evidence before the tribunal and placed not enough emphasis upon other parts of the evidence. That approach was repeated in the oral submissions that were made on her behalf at the hearing before me.
27. However, those submissions cavil only with the merits of the tribunal’s decision. The weight to be given to particular parts of the evidence and other information before the tribunal is a matter entirely for it. There was no suggestion that any of the findings made by the tribunal were not open to it on the evidence or information before it. There was no argument that the tribunal’s fact finding was illogical or irrational, or

that the conclusions that it reached were unreasonable in the sense required to justify interference on an application such as the present.

28. Further, Ms Nguyen argues that the requirement found in s.5F(2)(d) of the Act that the parties do not live separately and apart on a permanent basis contains two distinct concepts. The word *apart* in that subsection refers to the parties' physical arrangements – where they share the same accommodation and the like, whereas the word *separately* refers to the parties' intentions toward their relationship. She argues that the tribunal focussed too much upon the first matter – the physical arrangements and proximity of the parties to each other and not enough on the latter – the expressed intentions of the parties to continue their relationship.

29. Ms Nguyen's submissions are supported by authority. *Main v Main* (1949) 78 CLR 636 was a case that arose under Western Australian matrimonial legislation of the day. At issue was whether the wife could, on the facts of that case, establish that she and the husband had lived separately and apart for five years prior to the filing of her petition for divorce. Latham CJ, Rich and Dixon JJ (at p 641) described what the notion of living separately and apart entailed:

The two words 'separately' and 'apart' show that physical separation is necessary and that it is not enough that there has been a destruction of the consortium vitae or matrimonial relationship while the spouses dwell under the same roof. In matrimonial law the expressions like 'live separately', 'separated' and 'separation' are commonly used to indicate that the conjugal relationship no longer exists between the parties to the marriage. Although usually the existence of the conjugal or matrimonial relationship or consortium vitae means that the spouses share a common home and live in the closest association, it is not inconsistent with absences one from another, even for very long periods of time. It rests rather on a real mutual recognition by husband and wife that the marital relationship continues to subsist and a definite intention to resume the closer association of a common life as soon as the occasion or exigency has passed which has led to an interruption regarded by both as temporary ...

30. However, as the first respondent's submissions point out, more recently in *SZOMP v Minister for Immigration & Border Protection* [2015] FCAFC 69 the Full Court of the Federal Court of Australia gave

consideration to what was meant by the statutory phrase *live separately and apart* where it appears in the Regulations:

[54] *Several conclusions can therefore be drawn from this long history of the phrase “live separately and apart” at the time that this phrase was first introduced into the Migration Regulations 1989.*

[55] **First**, *the phrase denoted both a physical and a mental element. Although there was dispute about whether the phrase was a composite one embodying both elements (Sanros v Santos [1972] Fam 247, 258) or whether “separate” embodied a mental element and “apart” embodied a physical element (Crabtree v Crabtree (1963) 5 FLR 307, 319 - 320 (Nagle J), ultimately, that dispute was only a semantic one: Crabtree v Crabtree (1963) 5 FLR 307, 312 (Sugerman and Dovey JJ).*

[56] **Secondly**, *the mental element was independent of whether the parties lived in the same house. The mental element involved the intention of the parties to live separate lives following the destruction of the marital relationship (consortium vitae).*

[57] **Thirdly**, *although the physical element required some physical separation of the parties, the ultimate question was not whether the parties were physically living together in the same house. Even living in the same house could involve the parties being “separate and apart”. The focus on the physical element was upon whether their physical behaviour involved “living lives separate and apart from one another”. That could occur in the same house. Conversely, it might have been possible for a husband and wife who maintained separate residences to fail to meet the physical element if as a whole, their lives were lived as a single household.*

[58] **Fourthly**, *the reference to “cohabitation” in s 69(6) of the Supreme Court Act 1935-1947 (WA) and also in s 28(11) of the Matrimonial Causes Act was not treated as having altered this physical element to require ‘habitation’ in separate houses rather than as separate households. Those provisions, as considered by the High Court in Main v Main, and the Full Court of the Supreme Court of New South Wales in Crabtree v Crabtree provided:*

... where the husband and wife have lived separately and apart for a period of not less than five years immediately prior to the presentation of the petition and it is unlikely that cohabitation will be resumed. (Emphasis added).

Much the same requirement was included in s 48(3) of the Family Law Act 1975, which provided that there could be no dissolution of marriage if the court were satisfied that there was “a reasonable likelihood of cohabitation being resumed”.

[59] The conclusions relevant to s 5CB(2)(c)(ii) of the Migration Act that can be drawn from the history of the phrase “live separate and apart” are therefore that:

(1) both the physical and mental elements of the phrase were concerned with a husband and wife who were living their lives separate and apart from each other as separate households;

(2) the phrase therefore did not require that the parties live in different homes but rather focuses upon whether they lived their lives separately as separate households;

(3) conversely the phrase “not living separately and apart on a permanent basis” focuses upon whether the parties will not live as separate households on a permanent basis;

(4) even when legislation was enacted which included the requirement that it be “unlikely that cohabitation will be resumed”, the Full Court of the Supreme Court of New South Wales had held that living in a separate house was not required; and

(5) later legislation in 1975 that included the satisfaction requirement of no reasonable likelihood that cohabitation will be resumed also included an express provision that the “parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence”.

31. Ms Nguyen argues that the tribunal’s reasons demonstrate an erroneous pre-occupation with the physical living arrangements of the parties at the expense of the evidence about the parties’ intentions to continue their marriage relationship notwithstanding Newton’s imprisonment in the United States for 40 years. She argues that the tribunal’s failure to properly apprehend what was required by the phrase *not living separately and apart on a permanent basis* meant that it did not give

proper consideration to a relevant matter, incorrectly applied the test in s.5F(2)(d)(ii) of the Act and fell into jurisdictional error.

32. I accept that the tribunal was obliged to consider not only the physical living arrangements of the parties, but also their intentions concerning their marriage relationship. Indeed, I accept Ms Nguyen's submissions that in most cases there will be considerable overlap in those two matters. One is likely to be affected by the other in some cases.
33. The difficulty for Ms Nguyen's argument, however, is that the tribunal did give consideration to the evidence about her and Newton's intentions concerning their marriage. The tribunal recorded:

24. The following is a summary of the applicant's response at the hearing. She stated that she cannot give evidence to prove she and the sponsor were in an exclusive relationship but this is what she believes. She cannot give evidence because they lived apart except for the few weeks after their marriage. She stated that in those weeks she and the sponsor planned the future for their family together. She stated that before you get married you can't have seriousness and after the marriage they made serious plans to have children and raise a family. She stated that she knows the sponsor did a bad thing but she still loves him as he is her husband. He was never bad to her and she never saw him being bad to his son. She stated that she believes the sponsor and her cousin were separated but remained as friends and both were responsible for the care of their adopted son Drake. She stated that both the sponsor and her cousin loved Drake and she only ever saw them being good to Drake.

...

31. ...The Tribunal put to the applicant that as the sponsor has been sentenced to 40 years imprisonment in the USA it appears that she would not satisfy these last requirements for the grant of the visa. The applicant responded that all marriages have difficulties. People can live together but not provide each other with emotional support. In her case they are prevented from living together but they provide each other with a lot of support. They communicate with each other regularly and she has sent him money but he says he doesn't need any more money. She stated that he has applied to be transferred to Australia so she can visit him more easily and more often and she has applied for visas to the USA so she can visit him. She acknowledged that her visa

applications to the USA and his transfer applications have been refused.

...

39. The Tribunal notes the submission that the parties anticipated setting up their house together once the sponsor returned from the USA however this has not occurred because of the sponsor's incarceration.

...

46. A statement dated 26 February 2015 from the sponsor's parents was submitted. His parents' confirm the difficulties the applicant and sponsor had in communicating after the sponsor's arrest. They state that they communicate with the applicant and that she is very supportive to the sponsor. They state that in their opinion the relationship between them is genuine and they are happy that their son has a wife who cares deeply for him.

...

48. At the time of application the sponsor submitted a written statement outlining the circumstances of his meeting the applicant, the development of their relationship, his marriage proposal, and the marriage. He describes their plans as very simple. He states that they "Just want to enjoy each other's company, finalize her residency, and start working on where to go together from here."

34. Then, between paragraphs 48 and 52 of the reasons for decision, the tribunal considers in detail the evidence concerning the nature of the parties' commitment to each other. The tribunal records, accurately, the evidence given by Ms Nguyen and Newton at the time of the visa application concerning the development of their relationship and their future plans. The evidence was not extensive. The tribunal then recorded:

53. Copies of emails between the parties have been submitted as evidence of their communication and support for each other subsequent to the applicant's arrest and imprisonment and up to the present time.

54. The applicant states that she has tried several times, unsuccessfully, to obtain visitor visas to the USA. Copies of communication from the Consulate General of the United States

are submitted as evidence in this regard. The applicant states that the sponsor has applied for a transfer to serve his prison sentence in Australia. This is referred to in the email communication from the sponsor and the letter from his parents.

55. The Tribunal accepts that the parties provide a degree of emotional support to each other; however their ability to commit to a shared life together, provide companionship and practical support to each other is significantly restricted by the sponsor's lengthy incarceration in prison in the USA.

35. The first respondent argues that it would be a mistake to conclude that the tribunal did not consider the mental element of the statutory phrase. I agree. The tribunal's reasons demonstrate that the tribunal turned its mind to the appropriate construction of s.5F(2)(d)(ii).
36. Ms Nguyen's migration agent expressly brought the tribunal's attention to the decision in *Obele v Minister for Immigration and Citizenship* [2010] AATA 88. In that case the Administrative Appeals tribunal found that the couple there in question did not live separately and apart even though the applicant's de facto partner had been sentenced to eight years imprisonment because they intended that their relationship would continue during the de facto spouse's incarceration and cohabitation would resume after it was completed. Whilst the tribunal distinguished that case from Ms Nguyen's on the facts (and rightly so, in my respectful opinion) the tribunal's discussion of the case made clear that it understood the importance of it to Ms Nguyen's argument.
37. Ms Nguyen further argues that the tribunal impermissibly used the fact that Newton had been incarcerated for 40 years to conclude that she "could not" meet the "not live separately and apart" element of s.5F(2) of the Act. But the tribunal made no such finding. Relevantly, what the tribunal said was:

[61] ...The tribunal also notes that, given Newton's forty year prison sentence, the parties have not lived together since October 2011 and are not able to live together for forty years from the time of Newton's conviction in June 2013. In the tribunal's view this could be indicative of a breakdown in the marriage and may lead to a finding that the parties do not live separately and apart on a permanent basis.

38. As to the last sentence of that paragraph, both parties approached the application on the basis that the tribunal's reasons are probably erroneous and what the tribunal meant to say was: "*In the tribunal's view this could be indicative of a breakdown in the marriage and may lead to a finding that the parties live separately and apart on a permanent basis*".
39. I accept the first respondent's argument that evidence of Newton's incarceration was evidence which could or might lead to a finding that the parties lived separately and apart on a permanent basis. But the tribunal's use of the words "could be indicative" and "may lead to a finding" are demonstrative that it did not form that view that a lengthy incarceration necessarily had to lead to a finding that the parties "lived separately and apart" or that Ms Nguyen "could not" meet the "not live separately and apart" element of s.5F(2).
40. As the first respondent points out, the tribunal did not shut its mind to the possibility of the parties satisfying the "lived separately and apart" element notwithstanding Newton's lengthy incarceration. The tribunal's view was that, on the right facts (like in *Obele*) the requisite marital intention could continue to exist. However, the tribunal did not consider, on the facts of the case before it, that it did.
41. In my view, the tribunal did give consideration to the mental aspect of s.5F(2)(d)(ii) in its consideration of whether Ms Nguyen and Newton do not live separately and apart on a permanent basis. Whilst the tribunal did not, in terms consider the "physical" and the "mental" aspects of s.5F(2)(d)(ii) separately, there was no error to deal with the matter as it did. The tribunal recorded the evidence as I have set out above, acknowledged that the terms *separately* and *apart* in s.5F(2)(d)(ii) had distinct meanings and should not be conflated but concluded that it was not satisfied that the parties do not live separately and apart on a permanent basis.
42. In my view, this ground of review has no merit.

Ground 2

43. Ms Nguyen's second ground of review is:

2. The Applicant asserts that the Second Respondent has made a jurisdictional error in incorrectly interpreting and applying the meaning of 'permanent' in s5F(2)(d)(ii) of the Migration Act 1958 to the Applicant's circumstances;

44. There is no dispute that the tribunal raised with Ms Nguyen and her representative its concerns that she could not meet the definition of *spouse* as defined in s.5F(2) of the Act. Ms Nguyen argues that the tribunal was concerned about that because Newton had been incarcerated for a period of 40 years and that necessarily meant that the parties did not currently reside together and it was not anticipated that they would reside together for some time. She argues that the tribunal found that it could therefore not be satisfied that the parties did not intend to live separately on a *permanent* basis.

45. Ms Nguyen argues that:

27. According to the Merriam-Webster dictionary, the term "permanent" is defined as something that is "not temporary or changing."

28. Though it is acknowledged that a 40 year sentence is a significant period of time, the sentence is not a life sentence. As such, on the very basic definition of the term "permanent" it cannot be argued that the couple are living permanently apart whilst there is still the possibility that the Sponsor will be able to serve his sentence and once again join the Applicant in Australia.

29. It is submitted that the Second Respondent's incorrect application of the term "permanent" to the circumstances of the parties was a jurisdictional error.

46. The difficulty with this argument is that the tribunal did not find that it could not be satisfied that the parties did not intend to live separately and apart on a permanent basis because Newton had been incarcerated for 40 years. The matter was the subject of consideration by the tribunal in paragraph 61 of the reasons. I have extracted them above. For the reasons I have given above, I do not consider that the tribunal has misapplied the meaning of the word *permanent* in s.5F(2)(d)(ii) of the Act. It is clear from the reasons in paragraph 70 that the tribunal's conclusion about this matter was also informed by its finding that the parties did not have a mutual commitment to a shared life together as

spouses to the exclusion of all others at the time the visa application was made.

47. As to both grounds 1 and 2, the first respondent argues that, in addition to the arguments I have already recorded, whether or not the tribunal made errors as Ms Nguyen contends, the errors are not material to the tribunal's decision. I think that the first respondent's submission about this matter is correct.
48. Section 5F(2)(b) requires that the tribunal be satisfied that Ms Nguyen and Newton have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The tribunal was not satisfied that they had such a commitment. The tribunal said:

61. As stated previously, on 30 June 2013 the sponsor was sentenced to forty years imprisonment in the USA after being convicted for the sexual abuse of his son and his involvement in an international child exploitation conspiracy involving his son. Peter Hong Phuc Truong was sentenced to thirty years imprisonment for the sexual abuse of his adopted son and his involvement in an international child exploitation conspiracy involving his adopted son. All media reports at the time of the investigation, trial and conviction refer to Peter Hong Phuc Truong as the sponsor's partner. Whilst there is evidence contradicting this, and pointing to a separation in 2009, the Tribunal finds after assessing all the evidence that it cannot be satisfied that the relationship between the sponsor and Peter Hong Phuc Truong had ended. In addition, the evidence indicates that the sponsor was involved in a sexual relationship with his adopted son Drake and was a member of an international paedophile ring, presumably involving sexual relationships with other children. Whilst it cannot be said that these sexual relationships were consensual partner relationships it nonetheless raises questions regarding the sponsor's commitment to an exclusive spouse relationship between the sponsor and the applicant. The Tribunal also notes that, given the sponsor's forty year prison sentence, the parties have not lived together since October 2011 and are not able to live together for forty years from the time of the sponsor's conviction in June 2013. In the Tribunal's view this could be indicative of a breakdown in the marriage and may lead to a finding that the parties do not live together and live separately and apart on a permanent basis.

62. The Tribunal put these concerns to the applicant at the first hearing. The applicant responded that if she is granted the

partner visa the sponsor will have a stronger chance of succeeding in being transferred to Australia to serve his prison sentence in a place where she would be able to visit him. She stated that she would wait for the sponsor because she loves him and she is his wife. Their marriage is ongoing. As put to the applicant at the hearing, the sponsor's transfer applications have been refused and there is no evidence before the Tribunal to indicate that the situation regarding his transfer will change.

49. As I have already extracted above, in paragraph 70 of the tribunal's reasons, the tribunal concluded that the parties did not have a mutual commitment to a shared life together as spouses to the exclusion of all others at the time Ms Nguyen made her visa application.
50. The tribunal was not satisfied that Newton had a commitment to Ms Nguyen to a shared life as husband and wife to the exclusion of all others, at the time of her visa application or at the time of the decision. The tribunal explained why. The evidence before the tribunal permitted of the findings made and the conclusions reached by the tribunal.
51. Ms Nguyen, by her grounds of review, does not seek to cavil with the failure by the tribunal to be satisfied that, at the time of the application for the visa, she and Newton had a mutual commitment to a shared life together as spouses to the exclusion of all others.
52. The failure by the tribunal to be so satisfied was fatal to Ms Nguyen's application. Thus, even if the tribunal fell into error as asserted in grounds 1 and 2 of Ms Nguyen's grounds of review, it would not lead to the relief that she seeks in these proceedings.

Ground 3

53. Ms Nguyen's third ground of review is:

3. The Applicant asserts that the Second Respondent has made a jurisdictional error in failing to take into account the relevant consideration of the Sponsor's incarceration as the primary reason for the difficulty in providing additional evidence regarding the relationship between the Applicant and her Sponsor;

54. The tribunal noted that at the time of the visa application and at the review before the tribunal, Ms Nguyen and Mr Newton had provided little evidence to illustrate that their relationship was genuine. Ms Nguyen argues that on this basis, the tribunal found that she and her sponsor did not satisfy the definition of spouse contained in s.5F of the Act. She is correct about that.
55. She further argues that when reaching that conclusion, the tribunal failed to give proper consideration to the “circumstances of the case that render it impossible for the applicant to provide the further evidence required to illustrate the genuine and continuing nature of the relationship between the applicant and sponsor”.
56. Her argument continues (footnotes omitted):

32. The Second Respondent has found that at the time of the application, there was little evidence to illustrate the Applicant and her spouse met the criteria regarding the financial aspects, social aspects, the nature of the household or the parties commitment to each other to be able to make a decision that the parties were in a genuine and continuing relationship.

33. The circumstances of the crime of the sponsor were well detailed by the Second Respondent throughout the course of the review hearings. Whilst the Second Respondent has noted that the incarceration of the sponsor has made it difficult for the parties to provide evidence that the relationship is ongoing between the parties, the Second Respondent has still made a decision to refuse the review application on the basis of the limited additional evidence provided in support of the application.

34. In response to queries regarding the lack of evidence provided at the time of the partner visa application, the Applicant advised the Second Respondent that the couple had anticipated providing further information for the application to the First Respondent upon the Sponsor's return from what was meant to be a short trip to the United States. As per the interview conducted with the Department on 20 July 2013, the Applicant anticipated her sponsor to be returning to the country in November 2011.

35. Whilst this may not be the correct approach when making an application for a partner visa, it is not necessarily indicative of a non-genuine relationship if the parties to the application choose to submit further evidence at a later date.

57. Ms Nguyen submits that in making the decision to refuse the application, the tribunal has not taken into consideration the difficulties associated with providing documentation and other evidence necessary to support her claims under the current circumstances. She argues that though the crimes of which Newton was convicted and his subsequent jailing in the United States make it difficult to provide the type of evidence the tribunal referred to in its decision, the absence of that evidence does not necessarily mean that the tribunal could not find that Ms Nguyen and Newton were *spouses* for the purposes of the Act.
58. She argues that despite the current difficulties associated with providing evidence of the relationship, she was still able to provide evidence that she and Newton communicate as frequently as possible, and that family members are aware of the ongoing relationship between the couple. Evidence relating to financial circumstances, social interaction and establishment of the household are clearly unable to be proved due to the incarceration of Newton.
59. Her submission concludes:

41. As such, it is submitted that the Second Respondent's finding that the limited amount of evidence currently available to show the parties were in a spousal relationship is a jurisdictional error, in that the Second Respondent failed to take into account the unusual and extenuating circumstances that make it extremely difficult for the parties to provide the required evidence to illustrate the genuine nature of the relationship.

60. However, the tribunal's reasons make it clear that the tribunal took into account the difficulty with Ms Nguyen providing the relevant evidence about her relationship with Newton. As the first respondent points out, the tribunal was alive to those difficulties. For example at paragraph 59 of its decision the tribunal said:

The Tribunal notes that the parties' ability to provide further evidence regarding the factors to be considered in determining whether or not a spousal relationship existed at the time of application is limited by the particular circumstances of this relationship, namely the sponsor's lengthy incarceration in the USA. The Tribunal accepts that the applicant has attempted to obtain visas to the USA and the sponsor has applied for transfers to Australia and that all these avenues have been refused. The Tribunal also accepts that, subsequent to the time of application,

the parties have communicated with each other by email. However, after taking this into account, and considering all the evidence before it, the Tribunal is not satisfied that all the circumstances in this case support the claim that the parties were spouses in a marriage relationship at the time of application.

61. I accept the first respondent's submission that in those circumstances, the factual contention that the tribunal did not take such matters into account must be rejected.
62. Further, as the first respondent submits, even if the tribunal did not take into account the difficulty experienced by Ms Nguyen providing relevant evidence about her relationship with Newton, that would not amount to a jurisdictional error because the tribunal was not bound to take that matter into account.
63. A failure to take into account relevant consideration can only arise if that consideration was a "mandatory consideration" in the sense discussed by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39. To be a mandatory consideration it must be expressly stated to be required to be taken into account by the relevant legislation or, otherwise, must arise by implication from the subject-matter, scope and purpose of the relevant legislation: *Peko-Wallsend* at 39 – 40. The difficulty in obtaining relevant evidence was not such a consideration in the present case.
64. I accept the first respondent's submission that Ms Nguyen's complaint in this ground is, in truth, an impermissible attempt to revisit the merits of the tribunal's decision and the tribunal's attribution of weight to various parts of the evidence before it. They are not matters with which this Court might interfere.
65. In my view, ground three of the application for review does not reveal jurisdictional error.

Conclusion

66. The application for review does not reveal that the tribunal's decision is attended by jurisdictional error. The decision is a privative clause decision and so, is not able to be reviewed by this Court.
67. The application must be dismissed with costs.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of Judge Jarrett

Associate:

Date: 13 January 2016